STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT A. ROSE,

Defendant-Appellant.

UNPUBLISHED
June 25, 1999

No. 207985
Oakland Circuit Court
LC No. 96-148428 FH

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, to wit: a knife, MCL 750.227(1); MSA 28.424(1), and sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to 365 days in jail. He now appeals as of right. We affirm.

Defendant claims on appeal that he was denied his right to the effective assistance of counsel. We review such claims to see if defendant's representation fell below an objective standard of reasonableness and whether this was so prejudicial to defendant that he was denied a fair trial. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). This Court previously denied defendant's motion to remand for an evidentiary hearing,[1] and we now resolve this claim by details that are supported in the available record. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996).

Defendant was originally arrested for being in a city park when it was closed and for disorderly conduct. During a search of his impounded car, a ten-inch, non-folding knife with a five-inch, double-edged blade was discovered under the driver's seat of his car. Defendant first contends that his counsel should have moved to suppress the knife as the fruit of an illegal search.

The right of an individual to be free from unreasonable searches and seizures is recognized under both the federal and state constitutions.[2] For a search to be reasonable, it must generally be supported by: (1) probable cause and (2) either a warrant or circumstances which fall within a recognized exception to the warrant requirement. *People v Davis*, 442 Mich 1, 9-10; 497 NW2d 910 (1993). Two recognized exceptions to the warrant requirement are: (1) searches incident to a lawful

arrest, and (2) an inventory search of an impounded motor vehicle. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996) (search incident to arrest); *People v Toohey*, 438 Mich 265, 279, 284; 475 NW2d 16 (1991) (inventory search). See also *People v Houstina*, 216 Mich App 70, 75-78; 549 NW2d 11 (1996) (both exceptions).

A Troy Police Sergeant testified at trial that he observed an apparently unoccupied vehicle at 5:30 a.m. in a city park which was closed between the hours of 10:00 p.m. and 7:00 a.m. At 6:30 a.m., the sergeant checked on the car again and noted the hatchback was propped up with a two-by-four. There was also another car in the lot. Approaching on foot, the sergeant observed defendant stretched out in a sleeping bag, watching television. It looked like defendant was living in the vehicle. Defendant became openly hostile and abusive when the sergeant tried to explain that he must not be in the park until it opened. By defendant's testimony, he had just come from a homeless shelter and did not arrive at the park until 7:00 a.m. The sergeant had accused him of being a vagrant, but his denial left the sergeant unconvinced and defendant became frightened. In any event, when the sergeant radioed for assistance, defendant effected a temporary escape by running into the park. Defendant ran to some other people who had just arrived, then used a public telephone. With the help of a second officer, defendant was captured and his car was impounded.

We note that defendant was validly arrested for disorderly conduct, under circumstances that were clearly not a pretext for a search, but rather, resulted from defendant's resistance to a lawful investigative detention made under circumstances where the sergeant was authorized to make an arrest. MCL 764.15(1)(a); MSA 28.874(1)(a); *Champion, supra* at 115. Because the sergeant confronted defendant when he was still in his car, the search-incident-to-arrest exception permitted the entire passenger compartment to be searched. *New York v Belton*, 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768 (1981); *People v Bullock*, 440 Mich 15, 26; 485 NW2d 866 (1992); *People v Fernengel*, 216 Mich App 420, 422-426; 549 NW2d 361 (1996). Moreover, the police in this case were reasonable in impounding defendant's car and inventorying its contents pursuant to their public caretaker role and their policy designed to (1) protect an arrestee's property, (2) protect themselves against claims of lost or stolen property, and (3) to reduce potential physical danger. *Toohey, supra* at 284-286.

Although defendant claims that the arresting officers may not have informed him of his right to avoid incarceration by posting interim bail, the interim bail statute, MCL 780.581(2); MSA 28.872(1)(2), does not allow a defendant to post bail at the scene of the arrest, hence, whether it was violated or not is not causally related to the propriety of the vehicle's impoundment. *People v Poole*, 199 Mich App 261, 263-264; 501 NW2d 265 (1993). Accordingly, the search that yielded the knife was also proper under the inventory-search exception. Because, on the record before this Court, the knife recovered from defendant's car was clearly admissible, he has failed to demonstrate that his counsel's failure to make a futile motion to have it suppressed amounted to either an objectively unreasonable performance or resulted in prejudice to defendant. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant also claims that his counsel should have moved to compel the prosecution to produce the other people who were in the park as res gestae witnesses, or should have sought to subpoena them

on the theory that their testimony would have supported defendant's version of events and, hence, mandated the knife's exclusion from evidence. First, the prosecution has no duty to produce unknown witnesses. MCL 767.40a; MSA 28.980(1); *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995). Second, the failure of defense counsel to interview or investigate witnesses does not, by itself, constitute ineffective assistance of counsel. *People v Cabellero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Defendant makes no suggestion as to how his counsel might have proceeded to locate these witnesses. Hence, he has failed to overcome the strong presumption of his counsel's adequacy. See *Mitchell, supra* at 156. Last, assuming arguendo that witnesses could have been located and that they would have corroborated defendant's assertion that it was after 7:00 a.m. when the sergeant first approached him, such testimony would not have called the admissibility of the knife into question. Vagrancy itself is a type of disorderly conduct, MCL 750.166(1)(g); MSA 28.363(1)(g), and defendant's flight from his lawful investigative detention was itself an arrestable offense. MCL 750.479; MSA 28.747; *Champion, supra* at 115. Accordingly, defendant was not denied the effective assistance of counsel by this aspect of his attorney's performance. *Mitchell, supra* at 164-167.

Affirmed.

/s/ Janet T Neff
/s/ Michael J. Kelly
/s/ Harold Hood

[1] *People v Rose*, unpublished order of the Court of Appeals, entered March 31, 1998 (Docket No. 207985).

[2] The Fourth Amendment of the United States Constitution protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches or seizures . . . ." US Const Am IV. It was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. US Const Am XIV; *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). The Michigan Constitution provides "[t]he person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures . . . ." Const 1963, art 1, § 11.